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Supreme Court, U.S.
FILED
OCT 13 1998
CLERK

No. 98-374

In The

Supreme Court of the United States

October Term, 1998

SUN-DIAMOND GROWERS OF CALIFORNIA,

Cross-Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR SUN-DIAMOND GROWERS OF CALIFORNIA

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SUMMARY OF THE ARGUMENT

The Independent Counsel does not, because it cannot, address the merits of Sun-Diamond Growers of California's ("Sun-Diamond") arguments. The Independent Counsel's singular response to Sun-Diamond's petition is that the questions presented therein are not worthy of Supreme Court attention. As shown below, however, both questions raise substantial and important legal issues with widespread implications. Moreover, the positions adopted by the Court of Appeals are either at odds with, or extend beyond, the decisions of its sister circuits.

REASONS FOR GRANTING THE CROSS-PETITION

I.

THE COURT OF APPEALS' DECISION ESTABLISHES A NEW VICARIOUS LIABILITY PRINCIPLE THAT UNCONSTITUTIONALLY STRIPS DEFENDANTS OF A CRIMINAL DEFENSE.

The jury, imputing the conduct of Richard Douglas ("Douglas") to Sun-Diamond, convicted the company of defrauding James Lake's ("Lake") employers, Robinson, Lake, Sawyer & Miller ("RLSM") and Bozell Worldwide, Inc. ("Bozell"). At the District Court and again on appeal, Sun-Diamond contended that the jury could not have reached this conclusion because the conduct of Lake — who confessed that *both* Douglas *and he* "deceiv[ed]" and "defrauded" Sun-Diamond[1] — must be imputed to Lake's employers, thereby rendering RLSM and Bozell perpetrators and *not* victims of the alleged scheme to defraud.

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1. J.A., Tab 3 at 432, 469.

Neither the District Court nor the Court of Appeals pointed to any evidence whatsoever that Lake — when coordinating with Douglas and four other members of Lake's public relations firm to make an unlawful corporate, conduit contribution — acted beyond the scope of his employment.[2] In fact, the Court of Appeals found the opposite to be true when recognizing that Douglas and Lake *both* "occupied high-level management positions in their respective firms, and both men's firms sought to establish good relations with Secretary Espy." Pet. App. 18. The Court of Appeals also recognized — as is readily apparent by the facts here — that "Sun-Diamond does look more like a victim than a perpetrator[.]" Pet. App. 16.

But instead of reversing Sun-Diamond's conviction on the ground that the Independent Counsel failed to prove a scheme to defraud RLSM and Bozell, or even addressing whether there was sufficient evidence to sustain the jury's verdict, the Court of Appeals held that Sun-Diamond's challenge fails *as a matter of law*, finding that *no* defendant can prove that a purported corporate victim — *as determined by the prosecutor* — was in fact a perpetrator of the alleged fraud because imputation rules do not apply on the "victim side[ ]." Pet. App. 18; *see also* Pet. App. at 19 ("it is not at all clear that imputation on the other side of the equation would be useful. . . ."). In articulating this new, and fundamentally flawed, vicarious liability principle, the Court of Appeals did not analyze *whether* Lake's employers were victims, but instead adopted *in toto* the Independent Counsel's classification as set forth in the Indictment that

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2. The Independent Counsel's suggestion in a footnote, Opp. at 3 n.4, that Lake's knowledge should not be imputed to his employers belies the evidence that Lake, a name partner of his firm, involved four other members of his firm in a scheme that not only benefitted the firm by satisfying a client — *i.e.*, Douglas/Sun-Diamond — but also satisfied the firm's objective of "maintain[ing] good relations with Secretary Espy." Pet. App. 18; *see also* Cross-Pet. at 14.

Lake's employers were victims. By adopting (without citation or reference to evidence) the Independent Counsel's identification of RLSM and Bozell as "victims," and then by holding that Lake's conduct cannot be imputed to RLSM and Bozell because they were victims, the Court of Appeals impermissibly transformed an issue of fact (*whether* Lake's employers were victims) into an irrebuttable presumption.[3]

Instead of addressing Sun-Diamond's arguments concerning the legal and policy implications of the ruling below,[4] the Independent Counsel mischaracterized the issue raised here when arguing that the trial evidence supports a finding that Douglas acted on behalf of Sun-Diamond. Even assuming *arguendo* that there was sufficient evidence from which the jury could have found that Douglas acted on behalf of his employer, the issue raised on appeal was whether the jury could (and should) have concluded beyond a reasonable doubt that *Lake* acted on behalf of *his* employers. Sun-Diamond challenges the Court of Appeals' conclusion of law that agency principles do not apply when determining whether an entity identified as a victim by the prosecutor was indeed a perpetrator.[5]

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3. As the Court of Appeals was the first and only court to adopt this victim/perpetrator distinction in the application of imputation law — and the first court to deny a defendant the defense that a corporate "victim" was in fact a perpetrator — Sun-Diamond had no opportunity to raise its due process argument in the lower courts.

4. *See* Cross-Pet. at 10-15.

5. The Independent Counsel emphasizes the fact that Sun-Diamond does not point to a split in the circuits concerning this issue. As the Court is well aware, however, a circuit split is not a prerequisite to Supreme Court review. *See* S. Ct. R. 10(c). This issue raises an important question of first impression that (1) concerns imputation principles under federal common law; and (2) raises due process concerns that certain defendants charged with fraud are denied a legal defense.

Accordingly, the Independent Counsel's argument that there "is simply nothing in the appellate decision below for this Court to review" is, at best, confused. The Court of Appeals, in no uncertain terms, held that Sun-Diamond's fraud convictions should not be reversed even "assuming" that Lake acted within the scope of his employment:

> *Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, Sun-Diamond's argument rests on a faulty assumption — that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not.* Imputation is a legal fiction designed to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims.

Pet. App. 18-19 (emphasis added). The *legal* issue raised here is whether the Court of Appeals' holding unconstitutionally precludes criminal defendants from arguing that a purported corporate victim was in fact a perpetrator.

This issue raises important due process concerns worthy of Supreme Court review. As this Court is well aware, the federal wire and mail fraud statutes are far-reaching and are invoked frequently by prosecutors across the nation. Especially in light of the so-called "honest services" statute, 18 U.S.C. § 1346, prosecutors commonly allege that the victim of a defendant's scheme to defraud is a corporate principal, typically

an employer. *See, e.g.*, discussion *infra* in part II; Cross-Pet. at 16-24. The prosecutor, of course, has the burden of proving beyond a reasonable doubt this scheme to defraud. Accordingly, a defendant, in rebutting this element in a fraud prosecution, should be permitted to present to a jury the defense that the alleged victim was in fact a perpetrator if an agent of the "victim" participated — within the scope of his agency relationship — in the alleged scheme to defraud. Without an intended victim there can be no scheme to defraud.[6]

By stripping Sun-Diamond of this legal defense, the Court of Appeals subjects defendants like Sun-Diamond to overcharged fraud prosecutions and fundamentally unfair felony sentences for what may not even amount to felonious conduct. For this reason, the Court should review and reverse Sun-Diamond's fraud convictions.

II.

THE COURT OF APPEALS' INTERPRETATION OF THE "IDENTIFIABLE HARM" STANDARD FOR A CONVICTION BASED UPON SO-CALLED "HONEST SERVICES" FRAUD CREATES A SPLIT IN THE CIRCUITS.

Neither the District Court nor the Court of Appeals found that Douglas or Lake intended to harm RLSM or Bozell. Nor did the lower courts find that "identifiable harm" to the purported victims was a foreseeable result of the actual scheme. Instead, the District Court and the Court of Appeals found that

6. As this case concerned Federal Election Campaign Act violations — *and the only property stolen belonged to Sun-Diamond* — it is not surprising that the Independent Counsel had trouble finding a "victim" of conduct that in reality amounted to an unlawful campaign contribution. *See, e.g.*, J.A., Tab 3 at 432, 469; Cross-Pet. at 4-5.

the "identifiable harm" standard was satisfied, and Sun-Diamond's wire fraud convictions could be sustained, because, in their view, it should have been reasonably foreseeable to Lake and Douglas that RLSM and Bozell might suffer harm in the event Douglas and Lake were caught, and the fraud discovered. Pet. App. 23. This attenuated reading of the "identifiable harm" principle runs afoul of the well-established precedent that "not every breach of a fiduciary duty works a criminal fraud,"[7] and conflicts with the holdings of all other circuit courts that have addressed the "identifiable harm" standard of so-called "honest services" fraud. *See* 18 U.S.C. § 1346.

The Independent Counsel makes two conclusory assertions when opposing Sun-Diamond's cross-petition on this issue: (1) there is "no legal error for this Court to review"; and (2) there is "no circuit conflict." Opp. at 6, 7. To the extent that these assertions are even supported by argument, they rest upon flawed reasoning.

Despite the Independent Counsel's argument to the contrary, Sun-Diamond has plainly articulated the legal issue raised here. The Court of Appeals affirmed Sun-Diamond's fraud convictions because "[t]here is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM *once word of the scheme got out*." Pet. App. 23 (emphasis added). Unlike the other "honest services" cases discussed in the cross-petition[8] — the Court of Appeals held that a jury needs to find merely that the defendant could reasonably foresee that the alleged victim of a scheme to defraud may suffer hardship *if the scheme were*

7. *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983); *see also* cases cited *infra* at n.11.

8. Cross-Pet. at 17-23.

discovered. The question raised here is thus whether, as a matter of law, the Court of Appeals correctly interpreted the "identifiable harm" element of wire fraud. In other words, this Court should determine whether the forseeability of certain adverse, economic consequences to the alleged victim of a scheme to defraud resulting from an eventual *discovery* of the fraud is sufficient to sustain a fraud conviction, even if the defendant neither intended nor reasonably contemplated *any* harm befalling the alleged victim as a direct result of the scheme.[9]

Nor does the Independent Counsel even address Sun-Diamond's argument that the Court of Appeals' standard criminalizes virtually every breach of fiduciary duty. *See* Cross-Pet. at 22-23. This is not surprising because the Independent Counsel cannot dispute that virtually all breaches of fiduciary duty inevitably result in some economic harm where the breach is eventually discovered.[10] *See id.* Instead of addressing this

9. In its attempt to attribute certain concessions to Sun-Diamond that Sun-Diamond never made, the Independent Counsel mischaracterizes Sun-Diamond's argument as contending that the government must prove more than mere "injury to reputation" to sustain a fraud conviction. Opp. at 9 ("Sun-Diamond says that the court should have looked for a different harm, because injury to reputation is just too commonplace."). Sun-Diamond acknowledges that an intent to injure another's reputation can satisfy the "identifiable harm" standard. But whether a purported victim may suffer harm if the fraud is unintentionally discovered broadens the fraud statute to encompass virtually every breach of fiduciary duty. This result runs contrary to the express policy curtailing the scope of "honest services" fraud articulated by the various circuit courts addressing this issue.

10. Thus, while the Court of Appeals acknowledges the policy underlying the "identifiable harm" standard — *i.e.*, to limit the scope of "honest services" fraud to prevent a situation under which all civil breaches of fiduciary duty become criminal violations — the effect of the Court of Appeals' holding renders the boundaries of "honest services" fraud virtually limitless. *See* Pet. App. 23.

recognized policy concern, the Independent Counsel attempts to minimize Sun-Diamond's arguments by asserting that there is no circuit split on this issue.

But the reasoning underlying the Independent Counsel's claim that Sun-Diamond has not pointed to a circuit split is facially contradictory. While acknowledging that "the other circuits are in accord with *Lemire*," the Independent Counsel curiously asserts — in the same paragraph — that Sun-Diamond merely argues that the Court of Appeals "erroneously interpreted an earlier decision of the same circuit," *i.e.*, *Lemire*. Opp. at 7. Of course, if the Court of Appeals' decision conflicts with *Lemire*, the Court of Appeals' decision also conflicts with at least the five other circuit courts — *i.e.*, the First, Second, Sixth, Eight and Tenth circuits[11] — that the Independent Counsel concedes have adopted *Lemire*'s "identifiable harm" standard. Accordingly, the question raised here is not limited to "a matter for rehearing within the circuit[.]" *Id.* Rather, the Court of Appeals' evisceration of the "identifiable harm" standard conflicts with the decisions of every other circuit court that has reached this issue.

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11. *See United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997); *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 2452 (1997); *United States v. Cochran*, 109 F.3d 660, 664, 667 (10th Cir. 1997).

CONCLUSION

For the foregoing reasons, Sun-Diamond respectfully requests that this Court review the two questions presented in its cross-petition.

Respectfully submitted,

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